The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aydin Corporation--Reconsideration

File: B-224185.2

Date: February 10, 1987

DIGEST

1. Solicitation specification requirement that microwave radio equipment to be furnished have been operated successfully as a fully integrated system carrying real traffic in either military or commercial applications is not a "qualification requirement" under the Defense Procurement Reform Act of 1984, 10 U.S.C. § 2319 (Supp. III 1985) because the specification requirement does not constitute a systemized requirement for testing or other quality assurance demonstration that must be completed by offerors before award of a contract.

2. Protest based upon alleged improprieties in a solicitation (allegedly unduly restrictive terms) which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date for receipt of initial proposals.

DECISION

Aydin Corporation, Aydin Systems Division requests reconsideration of our decision in Aydin Corporation, B-224185, Nov. 28, 1986, 86-2 CPD ¶ ____, denying in part and dismissing in part a protest of the rejection of its proposal as technically unacceptable under request for proposals (RFP) No. F64608-86-R-0001, issued by the Department of the Air Force, Pacific Information Systems Division, Hickam Air Force Base, Hawaii, for the acquisition and installation of a digital microwave radio system for the Republic of the Philippines.

We affirm our prior decision.

Briefly, Section M-1 of the RFP advised offerors that "evaluation will consist of a detailed technical review of each part of the proposal pertaining to each section" of

Equipment Performance Specification EPS-85-002, which formed a part of the RFP. That specification provided, in part, as follows:

> "Performance Acceptability. In order to be acceptable under this specification, the bidder must offer radio and digital multiplex equipment that has been operated successfully as a full integrated system carrying real (not simulated or test) traffic in either military or commercial applications. Equipment operated in a laboratory environment . . . or that was operated in order to further its design development or to validate or test its performance characteristics is not acceptable."

Four proposals were received by the closing date, June 27, 1986. After evaluation of initial proposals, the contracting officer, by letter dated July 28, 1986, specifically asked Aydin whether its offered equipment had been sold and "is carrying live traffic today?" By letter dated August 13, 1986, Aydin responded that its offered system had been sold to several customers, including the government of Taiwan (installation scheduled for completion on October 31, 1986), Vandenberg AFB (a contract signed on June 30, 1986), and the Norwegian government (delivery scheduled for July 1987). On September 10, 1986, the contracting officer thereupon rejected Aydin's proposal as unacceptable because he found that Aydin "did not propose equipment that had operated successfully as [a] fully integrated system as required" by EPS-85-002. Aydin then filed its protest with our Office.

In its protest, Aydin argued that the Air Force's interpretation requiring equipment in prior operational use, if correct, would constitute a "qualification requirement" under the Defense Procurement Reform Act of 1984 (Act), 10 U.S.C. § 2319 (Supp. III 1985), and would be illegal because the procedural requirements of the Act have not been complied with. In our decision, we noted that the Act generally provides procedures for establishing qualification requirements by contracting agencies for contract awards, such as a qualified products list, qualified manufacturers list, or qualified bidders list. We also noted that the Act defines "qualification requirement" as a "requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract." In this case, since we found that the RFP simply contained a specification requirement that firms offer equipment, any equipment that had been in operational use and that met the specifications, we held that the Act did not apply under the circumstances.

Aydin continues to insist that the RFP specification requirement "is another label for exactly the same limitation on eligibility for award that is embraced in the [Act's] concept [of a] qualification requirement," although Aydin concedes that the RFP requirement does not involve actual testing of equipment or any other formal quality assurance demonstration. According to Aydin, the RFP required both that the equipment have been previously operated successfully and that the equipment comply strictly with detailed specifications. Thus, Aydin concludes that the RFP's "successfully operated" requirement as applied by the Air Force was exactly the type of eligibility requirement covered by the Act, which generally was intended to encourage competition. We disagree.

Strictly speaking, we think that any specification in any solicitation is a qualification requirement for an offeror that cannot meet that requirement. However, we also think that the "qualification requirement" as defined in the Act was not intended to apply to any individual specification of any one solicitation. Under the Act, the head of an agency, before establishing a qualification requirement, must, among other things, prepare a written justification, specify in writing and make available to a potential offeror all requirements which the offeror must satisfy, specify an estimate of the costs of testing, and ensure that an offeror is provided a prompt opportunity to demonstrate its ability to meet the standards for qualification. 10 U.S.C. § 2319(b). Further, within 7 years after the establishment of a qualification requirement or within 7 years following an agency's enforcement of a qualified products list, qualified manufacturers list or qualified bidders list, any such qualification requirement must be examined and revalidated. 10 U.S.C. § 2319(e). We therefore think that the Act only applies where the agency establishes a systematized quality assurance demonstration requirement on a continuing basis as an eligibility for award, such as a qualified products list, qualified manufacturers list, or qualified bidders list. See, generally, H.R. Conf. Rep. No. 98-1080, 98th Cong., 2d Sess. 179 (1984). Here, there was no such prequalification requirement since the RFP permitted award to any offeror that offered any equipment that met all specifications, including the prior use requirement. We therefore affirm our prior holding that the Act is inapplicable to the situation here.

Next, Aydin, in its protest to our Office, also argued that if the Air Force's interpretation of the RFP specification is correct (requiring prior operational use of equipment), then the RFP specification is unduly restrictive of competition. However, since we found that the RFP, in unmistakable terms,

clearly advised offerors of this prior use requirement, Aydin knew or should have known of this requirement upon receipt of the solicitation yet did not complain about its provisions until its proposal was rejected. We therefore found this protest ground to be untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986).

Aydin now argues that the Air Force's specification requirement was ambiguous and therefore the protester was reasonably unaware of the Air Force's interpretation prior to the rejection of its proposal. In support of its position, Aydin argues that the RFP requirement does not make clear whether the prior use of the equipment had to have occurred prior to the specifiction date, prior to the RFP issuance date, prior to receipt of offers, or prior to some other date. We reject this argument. As stated in our prior decision, the solicitation specified that "[i]n order to be acceptable under [the] specification," the equipment had to be in prior operational use. Further, the RFP clearly advised offerors that compliance with this specification would be evaluated and that all offerors had to meet all mandatory requirements. We therefore think that it is abundantly clear that Aydin's proposed compliance with this requirement at some future time of delivery months after award simply would not meet this requirement. Accordingly, we reaffirm our finding that Aydin knew or should have known that it would be unable to meet this requirement and that therefore the RFP was allegedly restrictive as applied to Aydin, upon receipt of the solicitation. Since Aydin failed to protest these allegedly restrictive terms prior to the closing date for receipt of initial proposals, this protest ground is untimely. 4 C.F.R. § 21.2(a)(1).

We affirm our prior decision.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel